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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 838.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

HAROLD A. FOSTER, FRANK E. WINCHELL, WILLIAM S. EDWARDS, AND HARRY H. PLATT.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED DECEMBER 29, 1913.

(23989.)

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1 Writ of error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the Judge of the District Court of the United States for the District of Massachusetts, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, between the United States of America and Harold A. Foster, Frank E. Winchell, William S. Edwards, and Harry H. Platt, a manifest error hath happened, to the great damage of the said United States of America, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, District of Columbia, on the twenty-ninth day of November, current, in the said Supreme Court, that, the record and procedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the first day of November, in the year of our Lord one thousand nine hundred and thirteen.

[SEAL.] CHARLES K. DARLING,
Clerk of the District Court of the United States,
District of Massachusetts.

Allowed by
JAMES M. MORTON,
U. S. District Judge.

2 Return of District Court on writ of error.

DISTRICT COURT OF THE UNITED STATES,
District of Massachusetts, ss:

And now, here, the judge of the District Court of the United States, in and for the District of Massachusetts, makes return of this writ by annexing hereto and sending herewith, under the seal of the said District Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the United States Circuit Court of Appeals for the First Circuit, as within commanded.

In testimony whereof, I, Charles K. Darling, clerk of said District Court of the United States, in and for the District of Massachusetts, have hereto set my hand and the seal of said court, this thirteenth day of November, A. D. 1913.

[SEAL.] CHARLES K. DARLING, *Clerk.*

3 *Transcript of record of District Court.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

At a District Court of the United States, begun and holden at Boston, within and for the District of Massachusetts, on the second Tuesday of September, being the ninth day of September, in the year of our Lord one thousand nine hundred and thirteen, before the honorable James M. Morton, jr., district judge.

UNITED STATES, BY INDICTMENT, v. HAROLD A. FOSTER, FRANK E. WINCHELL, WILLIAM S. EDWARDS, and HARRY H. PLATT.	No. 641.	Criminal docket.

The jurors for the United States of America, within and for the District of Massachusetts, upon their oath, present that before and at the time of the commission of the offence hereinafter charged one Harold A. Foster, of North Brookfield, in said district, was duly appointed, qualified, and acting as postmaster of the United States post-office at said North Brookfield, said post-office then being classified by the Postmaster General of the United States as a second-class office, and the salary of said postmaster fixed by said Postmaster-General, pursuant to law and the regulations duly established by said Postmaster General thereunder, at the sum of two thousand dollars a year; that said salary was based and ascertained upon the gross receipts of said post-office for the twelve months next preceding the thirty-first day of March, in the year nineteen hundred and eleven, and said salary was subject and required by law to be readjusted by said Postmaster General annually, and the next succeeding readjustment thereof was required to be made by said Post-

4 master General in accordance with the gross receipts of said post-office, as shown by the quarterly returns of said postmaster to the Auditor for the Post Office Department of the United States for the four quarters next preceding the thirty-first day of March in the year nineteen hundred and twelve, and said readjustment to take effect at the beginning of the fiscal year next ensuing, to wit, on the first day of July, in the year nineteen hundred and twelve; that said Postmaster General was required by law and the regulations aforesaid, for the purpose of readjusting such salary as aforesaid, not to include in said gross receipts of said post office the moneys received by said postmaster during said twelve months

preceding said thirty first day of March, in the year nineteen hundred and twelve, from the sale of stamps to any person or persons in large or unusual quantities, which were to be used for the prepayment of postage upon matter to be deposited in the mails of the United States for mailing and delivery at any United States post-office other than said North Brookfield post office, or to be used in the prepayment of postage upon any matter deposited for such mailing and delivery at said North Brookfield post-office, if such matter would in the ordinary and usual course of the business of the person or persons depositing such matter be deposited for mailing and delivery at a United States post-office other than said North Brookfield post-office; that Frank E. Winchell, of said North Brookfield, was at all the times aforesaid president and general manager of the Oxford Linen Mills, a corporation organized by law and having its usual place of business at said North Brookfield; that William S. Edwards and Harry H. Platt, both of New York, in the State of New York, were at all said times officers of the Sterling Debenture Corporation, said Edwards being treasurer and said Platt being assistant treasurer of said corporation, and said Sterling Debenture Corporation being a corporation organized by law and having its usual and principal place of business in said New York; that said Harold A. Foster, postmaster as aforesaid, said Frank E. Winchell, said William S. Edwards, and said Harry H. Platt, well knowing all the premises, on the second day of June in the year nineteen hundred and eleven, at said North Brookfield, unlawfully did conspire together to defraud the United States of its money and property in the manner following; that is to say, that said Winchell, as president and in behalf of said Oxford Linen Mills, should from time to time purchase from said Foster, postmaster as aforesaid, with the knowledge, consent, and connivance of said Foster, large quantities of United States postage stamps; that said Winchell should send said stamps to said Sterling Debenture Corporation at said New York, and that said Edwards and Platt, as such officers, should cause said Sterling Debenture Corporation to use said stamps for the prepayment of postage upon matter to be deposited by said Sterling Debenture Corporation in said New York post-office or in some post-office other said North Brookfield post-office; with the view and intent of them, said Foster, Winchell, Edwards, and Platt, by means of the purchase of stamps as aforesaid, irregularly and improperly to increase the gross receipts of said North Brookfield post-office during the period of twelve months beginning on the first day of April, in the year nineteen hundred and eleven, and ending on the thirty first day of March, in the year nineteen hundred and twelve, and thereby to enable said Foster as such postmaster to make returns as aforesaid to the Auditor of the Post Office Department as a basis for the readjustment of said Foster's salary as such postmaster for the fiscal year beginning on said first day of July, in the year nineteen hundred and twelve, in the manner aforesaid, which returns should include the sales of stamps so made

to said Winchell for the use of said Sterling Debenture Corporation, as aforesaid, in addition to sales of stamps made by said Foster as such postmaster at said North Brookfield to other persons in the regular, usual, and ordinary course of the business of said North Brookfield post-office, and with the view and intent on the part of said Foster, Winchell, Edwards, and Platt that said Foster, postmaster as aforesaid, should, in violation of the regulations of said Post Office Department and for the purpose of fraudulently increasing said Foster's salary and compensation as such postmaster, knowingly and fraudulently fail to report to the First Assistant Postmaster General the fact, which said Foster well knew, that such stamps so to be sold to said Winchell were to be used by said Sterling Debenture Corporation, as aforesaid, and with the further intent on the part of said Foster as such postmaster that such sales to said Winchell for the use of said Sterling Debenture Corporation, as aforesaid, should in violation of said post-office regulation be included and deemed to be a part of the gross receipts of said
6 North Brookfield post-office for the period aforesaid, and be made in part the basis of the readjustment in the manner aforesaid of said Foster's salary as such postmaster for said fiscal year beginning on said first day of July, in the year nineteen hundred and twelve; that all of the acts and things hereinbefore alleged were to be done by said Foster, Winchell, Edwards, and Platt knowingly, willfully, and fraudulently for the purpose and with the intent that said Postmaster General, in ignorance of such sales of stamps by said Foster as such postmaster to said Winchell for the use of said Sterling Debenture Corporation, as aforesaid, should increase the salary of said Foster as such postmaster upon such readjustment for said fiscal year beginning on said first day of July, in the year nineteen hundred and twelve, by a sum of money in excess of that which said Foster as such postmaster would be lawfully entitled to receive, and to cause and procure such excessive sum to be paid as salary to said Foster as such postmaster, and thereby to cheat and defraud the United State thereof:

That in pursuance of such unlawful conspiracy and to effect the object thereof, on the first day of July in the year nineteen hundred and eleven, said Foster, as such postmaster, did make a false return to the Auditor for the Post Office Department of the gross receipts of said North Brookfield post office for the quarter ended on the thirtieth day of June in the year nineteen hundred and eleven;

That in further pursuance of such unlawful conspiracy and to effect the object thereof, said Frank E. Winchell on said second day of June in the year nineteen hundred and eleven, at said North Brookfield, did send by registered mail to said Sterling Debenture Corporation at said New York a certain package;

That in further pursuance of such unlawful conspiracy and to effect the object thereof the said Frank E. Winchell, on said second day of June in the year nineteen hundred and eleven, at said North Brookfield, as president and general manager of said Oxford Linen

Mills, did purchase from said Harold A. Foster, as such postmaster, a large quantity of postage stamps, to wit, postage stamps of the amount and value of two hundred dollars.

And the jurors aforesaid, upon their oaths aforesaid, do further present that Harold A. Foster and Frank E. Winchell, both
7 of North Brookfield, in said district of Massachusetts, and William S. Edwards and Harry H. Platt, both of New York, in the State of New York, on the second day of June in the year nineteen hundred and eleven, at said North Brookfield, unlawfully did conspire together to commit an offence against the United States of America, that is to say, the offence denounced by section two hundred and six of the act of March fourth, nineteen hundred and nine, entitled "An act to codify, revise, and amend the penal laws of the United States," which said offence was to be committed by the said Harold A. Foster as postmaster of the United States post office at said North Brookfield in the manner following, that is to say, that the said Harold A. Foster, as such postmaster, should, in violation of the provisions of said section of said act, knowingly and fraudulently make false returns to the First Assistant Postmaster General for the purpose of fraudulently increasing said Foster's salary and compensation as such postmaster by knowingly and fraudulently failing to report to said First Assistant Postmaster General in the reports of the gross receipts of said post office required by law and the regulations of the Post Office Department of the United States to be made monthly to the said First Assistant Postmaster General, large and irregular sales of postage stamps to be made by said Foster, as such postmaster, to said Winchell, as president and general manager of the Oxford Linen Mills, a corporation organized by law and having its usual place of business at said North Brookfield, which said postage stamps, as said Foster, Winchell, Edwards, and Platt well knew were not to be used by said Oxford Linen Mills or by said Winchell, or by any other person, in prepayment of postage upon matter to be deposited in said North Brookfield post office, but which were to be used by the Sterling Debenture Corporation, a corporation duly organized by law and having its principal place of business at New York, in the State of New York, for the prepayment of postage upon matter to be deposited in the United States post office at said New York, or in some post office other than said North Brookfield post office, and with the intent on the part of said Foster, Winchell, Edwards, and Platt, and for the purpose of fraudulently increasing the compensation of said Foster, as such postmaster, for the fiscal year beginning July first, in the year nineteen hundred and twelve; that in pursuance of such unlawful conspiracy and to
8 effect the object thereof, the said Frank E. Winchell, on said second day of June, in the year nineteen hundred and eleven, at said North Brookfield, as president and general manager of said Oxford Linen Mills, did purchase from said Harold A. Foster, as such postmaster, a large quantity of postage stamps, to wit, postage stamps of the amount and value of two hundred dollars;

That in further pursuance of such unlawful conspiracy and to effect the object thereof, on the first day of July in the year nineteen hundred and eleven, said Foster, as such postmaster, did make a false return to the Auditor for the Post Office Department of the gross receipts of said North Brookfield post office for the quarter ended on the thirtieth day of June in the year nineteen hundred and eleven;

That in further pursuance of such unlawful conspiracy and to effect the object thereof, said Frank E. Winchell, on said second day of June in the year nineteen hundred and eleven, at said North Brookfield, did send by registered mail to said Sterling Debenture Corporation at said New York, a certain package.

This indictment was presented by the grand jury at the March term, A. D. 1913, when, to wit, March 24, 1913, the Honorable James M. Morton, district judge, sitting, the said Harold A. Foster, Frank E. Winchell, William S. Edwards, and Harry H. Platt, were set to the bar and had this indictment read to them, whereupon they severally said that thereof they were not guilty.

On the same day it was ordered by the court that each defendant be given two weeks to file dilatory plea.

On the fifth and seventh days of April, A. D. 1913, respectively, the following demurrers were filed:

Demurrer of Frank E. Winchell. (Filed April 5, 1913.)

The defendant Frank E. Winchell hereby withdraws his plea of "not guilty" to the indictment in the above-entitled case, and by protestation not confessing or acknowledging any of the matters in the first count in said indictment contained to be true in the manner and form therein set forth and alleged, hereby demurs to said first count in and of said indictment and for cause of demurrer shows:

First. That it appears by said first count in and of said indictment that the said first count thereof does not allege as against
9 said defendant any facts sufficient to constitute a crime.

Second. That it appears by said first count in and of said indictment that the said first count thereof does not allege as against said defendant any facts sufficient to constitute a crime at common law.

Third. That it appears by said first count in and of said indictment that the said first count thereof does not set forth any facts sufficient to constitute a violation of the statutes and penal laws of the United States therein made and provided.

Fourth. That it appears by said first count in and of said indictment that the said first count thereof does not set forth any facts sufficient to constitute a violation of any valid regulation or regulations of the Postmaster General of the United States.

Fifth. That each and every regulation of the Postmaster General of the United States in said first count set forth is invalid.

And the said defendant Frank E. Winchell hereby withdraws his plea of "not guilty" to the indictment in the above entitled case,

and by protestation not confessing or acknowledging any of the matters in the second count in said indictment contained to be true in the manner and form therein set forth and alleged, hereby demurs to said second count in and of said indictment and for cause of demurrer shows:

Sixth. That it appears by said second count in and of said indictment that the said second count thereof does not allege as against said defendant any facts sufficient to constitute a crime.

Seventh. That it appears by said second count in and of said indictment that the said second count thereof does not set forth any facts sufficient to constitute a violation of the statutes and penal laws of the United States therein made and provided.

Eighth. That it appears by said second count in and of said indictment that the said second count thereof does not set forth any facts sufficient to constitute a violation of any valid regulation or regulations of the Postmaster General of the United States.

Ninth. That each and every regulation of the Postmaster General of the United States in said second count set forth is invalid.

Tenth. That it appears by said second count in and of said indictment that the said second count thereof does not allege as against said defendant with sufficient particularity and certainty which of the several crimes denounced by section 206 of the act of March 4, 1909, entitled "An act to codify, revise, and amend the penal laws of the United States" the defendant is charged with violating.

Wherefore and for various divers other good causes of demurrer appearing in the said indictment and in the said first count and in the said second count thereof, respectively, the defendant Frank E. Winchell demurs thereto and to each of said counts, and prays the judgment of this honorable court that the said indictment be dismissed and that he be discharged and dismissed, and that he have such other and further relief as to the court may seem just and proper.

PHILIP RUBENSTEIN,
Attorney for F. E. Winchell.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*
BOSTON, MASS., *April 5th, 1913.*

Now comes Philip Rubenstein, attorney for the above named Frank E. Winchell and makes oath that he is of opinion that there is such probable ground in law for the within demurrer as to make it a fit subject for judicial inquiry and trial, and that it is not intended merely for delay.

DAVID A. ELLIS,
Justice of the Peace.

Demurrer of William S. Edwards and Harry H. Platt. (Filed April 5, 1913.)

The defendants William S. Edwards and Harry H. Platt hereby withdraw their plea of "not guilty" to the indictment in the above

entitled case, and by protestation not confessing or acknowledging any of the matters in the first count in said indictment contained to be true in the manner and form therein set forth and alleged, hereby demur to said first count in and of said indictment and for cause of demurrer show:

First. That it appears by said first count in and of said indictment that the said first count thereof does not allege as against said defendants any facts sufficient to constitute a crime.

Second. That it appears by said first count in and of said indictment that the said first count thereof does not allege as against said defendants any facts sufficient to constitute a crime at common law.

Third. That it appears by said first count in and of said in-
11 dictment that the said first count thereof does not set forth any facts sufficient to constitute a violation of the statutes and penal laws of the United States therein made and provided.

Fourth. That it appears by said first count in and of said indictment that the said first count thereof does not set forth any facts sufficient to constitute a violation of any valid regulation or regulations of the Postmaster General of the United States.

Fifth. That each and every regulation of the Postmaster General of the United States in said first count set forth is invalid.

And the said defendants William S. Edwards and Harry H. Platt hereby withdraw their plea of "not guilty" to the indictment in the above entitled case, and by protestation not confessing or acknowledging any of the matters in the second count in said indictment contained to be true in the manner and form therein set forth and alleged, hereby demur to said second count in and of said indictment and for cause of demurrer show:

Sixth. That it appears by said second count in and of said indictment that the said second count thereof does not allege as against said defendants any facts sufficient to constitute a crime.

Seventh. That it appears by said second count in and of said indictment that the said second count thereof does not set forth any facts sufficient to constitute a violation of the statutes and penal laws of the United States therein made and provided.

Eighth. That it appears by said second count in and of said indictment that the said second count thereof does not set forth any facts sufficient to constitute a violation of any valid regulation or regulations of the Postmaster General of the United States.

Ninth. That each and every regulation of the Postmaster General of the United States in said second count set forth is invalid.

Tenth. That it appears by said second count in and of said indictment that the said second count thereof does not allege as against said defendants with sufficient particularity and certainty which of the several crimes denounced by section 26 of the act of March 4, 1909, entitled "An act to codify, revise, and amend the penal laws of the United States," the defendants are charged with violating.

Wherefore and for various and divers other good causes of demurrer appearing in the said indictment and in the said first

12 count and in the said second count thereof, respectively, the defendants William S. Edwards and Harry H. Platt demur thereto and to each of said counts, and pray the judgment of this honorable court that the said indictment be dismissed and that they be discharged and dismissed, and that they have such other and further relief as to the court may seem just and proper.

DAVID A. ELLIS,
Attorney for Edwards and Platt.

BOSTON, MASS., *April 5th, 1913.*

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Now comes David A. Ellis, attorney for the above named William S. Edwards and Harry H. Platt, and makes oath that he is of opinion that there is such probable ground in law for the within demurrer as to make it a fit subject for judicial inquiry and trial and that it is not intended merely for delay.

PHILIP RUBENSTEIN,
Justice of the Peace.

Demurrer of Harold A. Foster. (Filed April 7, 1913.)

The defendant Harold A. Foster hereby withdraws his plea of "not guilty" to the indictment in the above-entitled case, and by protestation not confessing or acknowledging any of the matters in the first count in said indictment contained to be true in the manner and form therein set forth and alleged, hereby demurs to said first count in and of said indictment and for cause of demurrer shows:

First: That it appears by said first count in and of said indictment that the said first count thereof does not allege as against said defendants any facts sufficient to constitute a crime.

Second: That it appears by said second count in and of said indictment that the said second count thereof does not allege as against said defendants any facts sufficient to constitute a crime at common law.

Third: That it appears by said first count in and of said indictment that the said first count thereof does not set forth any facts sufficient to constitute a violation of the statutes and penal laws of the United States therein made and provided.

13 Fourth: That it appears by said first count in and by said indictment that the said first count thereof does not set forth any facts sufficient to constitute a violation of any valid regulation or regulations of the Postmaster General of the United States.

Fifth: That each and every regulation of the Postmaster General of the United States in said first count set forth is invalid.

And the said defendant Harold A. Foster hereby withdraws his plea of "not guilty" to the indictment in the above-entitled case, and by protestation not confessing or acknowledging any of the matters in the second count in said indictment contained to be true in the manner and form therein set forth and alleged, hereby demurs to

said second count in and of said indictment and for cause of demurrer shows:

Sixth: That it appears by said second count in and of said indictment that the said second count thereof does not allege as against said defendants any facts sufficient to constitute a crime.

Seventh: That it appears by said second count in and of said indictment that the said second count thereof does not set forth any facts sufficient to constitute a violation of the statutes and penal laws of the United States therein made and provided.

Eighth: That it appears by said second count in and by said indictment that the said second count thereof does not set forth any facts sufficient to constitute a violation of any valid regulation or regulations of the Postmaster General of the United States.

Ninth: That each and every regulation of the Postmaster General of the United States in said second count set forth is invalid.

Tenth: That it appears by said second count in and of said indictment that the said second count thereof does not allege as against said defendant with sufficient particularity and certainty which of the several crimes denounced by section 206 of the act of March 4, 1909, entitled "An act to codify, revise, and amend the penal laws of the United States," the defendant is charged with violating.

Wherefore and for various and divers other good causes of demurrer appearing in the said indictment and in the said first count and in the said second count thereof, respectively, the defendant Harold A. Foster demurs thereto, and to each of said counts,
14 and prays the judgment of this honorable court that the said indictment be dismissed, and that he have such other and further relief as to the court may seem just and proper.

By his attorney:

TIMOTHY HOWARD,
608 Slater Bldg., Worcester, Mass.

WORCESTER, MASS., *April 7, 1913.*

COMMONWEALTH OF MASSACHUSETTS, *Worcester, ss:*

Now comes Timothy Howard, attorney for the above named Harold A. Foster, and makes oath that he is of the opinion that there is such probable ground in law for the within demurrer as to make it a fit subject for judicial inquiry and trial and that it is not intended merely for delay.

Before me.

WILLIAM A. SCOLLEN,
Justice of the Peace.

This cause was thence continued to the June term, A. D. 1913, when, to wit, July 14, 1913, the same was set down for hearing on demurrers and heard in part by the court, the Honorable James M. Morton, district judge, sitting as aforesaid.

On the twenty-first day of July, A. D. 1913, this cause was again set down for hearing and fully heard by the court on demurrers.

Said cause was thence continued under advisement to the present September term, A. D. 1913, when, to wit, October 2, 1913, an opinion of the court is announced, sustaining demurrers.

It is thereupon, to wit, October 2, 1913, considered by the court, the Honorable James M. Morton, jr., district judge, sitting as aforesaid, that the said demurrers be, and the same are hereby, sustained, and that the indictment in this cause be quashed, and that the said Harold A. Foster, Frank E. Winchell, William S. Edwards, and Harry H. Platt, defendants, be discharged and go without day.

A true record.

Attest:

CHARLES K. DARLING, *Clerk.*

15 Opinion of the court. (October 2, 1913.)

MORTON, J.: The first count of this indictment charges the defendants with having conspired to defraud the United States. The alleged object of the conspiracy was to obtain for the defendant Foster a larger salary as postmaster at North Brookfield than he was by law and by the regulations of the Post Office Department entitled to. This object was to be accomplished, according to the allegations of the indictment, in the following manner: One of the other defendants, Winchell, was to buy at the North Brookfield post office large quantities of stamps, which he was to send to the other two defendants, Edwards and Platt, at New York City, for use there. Foster was to include the proceeds of these sales in his returns of the gross receipts of the North Brookfield post office to the Auditor for the Post Office Department, but was not to report the sales to the First Assistant Postmaster General as unusual ones, to the end that the receipts from such sales should be deemed to be part of the gross receipts of said post office, and, consequently, should be made in part the basis upon which Foster's salary was determined. It is alleged that the regulations of the department required large or unusual sales for use outside the district to be reported by the postmaster to the First Assistant Postmaster General, and further provided that such sales should not be included by the officials of the Post Office Department in the "gross receipts" upon which the postmaster's salary was fixed.

The defendants have demurred to this count on several formal or technical grounds, none of which seems to me to be well taken. The principal contentions of the defendants are that by statute Foster was entitled to a salary based upon "gross receipts"; that "gross receipts" included all sales, usual or unusual; that the regulations of the Postmaster General requiring unusual sales to be deducted from gross receipts for the purpose of fixing the postmaster's salary were contrary to the statute, and were invalid; that the effect of the alleged conspiracy, if successful, would be to procure for Foster only what he was legally entitled to, and not to defraud the United States.

By the provisions of section 5 of the act of July 12, 1876 (2 U. S. Comp. Stat., 2609), postmasters are divided into four classes. The second class is defined as including all those whose annual sal-
16 aries are between $2,000 and $3,000. The salaries of the second-class postmasters are fixed by the act of March 3, 1883 (2 U. S. Comp. Stat., 2619), which is entitled "An act to adjust the salaries of postmasters," and provides in substance "that the respective compensation of postmasters of the second class shall be annual salaries assigned in even hundreds of dollars, to be ascertained and fixed by the Postmaster General from their respective quarterly returns to the auditor * * * at the following rates, namely: Second class, gross receipts $8,000 and not exceeding $9,000, salary $2,000." The Postmaster General, as head of a department, "is authorized to prescribe*d* regulations not inconsistent with law for the governing of his department, the conduct of its officers and clerks, the distribution and performance of its business," etc. (R. S., sec. 161). Under this last statute the Postmaster General made a regulation to the effect that in determining the gross receipts of a post office for the purpose of fixing the postmaster's salary unusual sales of stamps should not be included, and that a statement of all such sales should be made monthly, not to the auditor (to whom gross receipts are reported), but to the First Assistant Postmaster General.

The crucial question upon the first count of the indictment is whether this regulation is valid. Congress itself has by statute undertaken to establish the salaries of second-class postmasters. It has done so by reference to the "gross receipts" of their respective post offices, a definite and unambiguous expression. Such receipts are reported to the auditor every quarter, and the act explicitly make these returns the basis for fixing salaries. Other statutes forbid postmasters from selling stamps or stamped paper at other than the regular prices, from soliciting business for their own offices, from selling outside their own districts, etc. Crim. Code, sec. 208.

The effect of the various statutes taken together is to make the salaries depend upon the gross receipts, and to prevent such receipts (and consequent salaries) from being increased by improper methods. The entire matter appears to be adequately covered by the statutes.

"The whole theory of the act of 1883 is that every postmaster
17 shall receive a salary dependent upon and regulated by the amount of business done at his office. The intent of the statute in this respect appears so plain upon a careful reading of it that it is difficult to elucidate it by argument or illustration." Lamar, J., United States *v.* Wilson, 143 U. S., 24, 28.

The regulation in question is not an attempt to define "gross receipts" (e. g., to say whether money order fees should be included therein), nor to clear up an ambiguity in the statute, nor to supply details lacking in the statute. The proceeds of the sales of stamps contemplated by the alleged conspiracy became part of the gross

receipts of the North Brookfield office, and were to be so reported. The effect of the regulation is to divide gross receipts into two parts, only one of which shall be considered in fixing salaries. The regulation assumes that some person in the department has the power to determine what sales shall be included in the "gross receipts" on which a salary is based. The effect of the regulation is therefore to make salaries dependent, not upon gross receipts returned to the auditor, as provided in the statute, but upon such part thereof as, in the opinion of somebody connected with the Post Office Department, is not unusual, nor for use outside the district.

An administrative officer has no right to substitute by regulation a different—even though it be a better—basis for fixing salaries than that explicitly provided by Congress. Regulations are valid only so far as they accord with and carry out and are not inconsistent with acts of Congress dealing with the same questions. United States *v.* George, 228 U. S., 14; Morrill *v.* Jones, 106 U. S., 466; United States *v.* Eaton, 144 U. S., 687. The function of a regulation is to make a tight joint between the law and the subject-matter to which the law applies.

The regulation in question does not complete and carry out the plan of compensation provided in the statute—no regulation was necessary for that purpose; it ignores the returns of gross receipts to the auditor, which the statute explicitly makes the basis for adjusting salaries; and it sets up instead a substantially different plan under which salaries are based not upon gross receipts returned to the auditor, but upon "ordinary" or "usual" gross receipts as determined by the department.

18 It seems to me that the regulation is inconsistent with the statute, and consequently invalid. I do not overlook the length of time during which the regulation has been in force without question; but the only persons directly affected by it were subordinate officeholders, who would be very reluctant to attack the validity of a regulation made by their superior officer. Acquiescence under such circumstances amounts to very little.

The object of the conspiracy, as alleged in the first count of the indictment, was to defraud the United States by securing for Foster a larger salary than he was entitled to under said regulation. "The offence here charged is predicated both upon the violation of the law and of the regulations made by the Postmaster General in pursuance of them." (Brief of United States attorney.) If the regulation was invalid, Foster was legally entitled to the salary which it was the object of the alleged conspiracy to secure for him. A conspiracy to obtain by improper methods what one is legally entitled to is not punishable as a conspiracy to defraud. United States v. Biggs, 211 U. S., 504; Williamson v. United States, 207 U. S., 425. In Curley v. United States, 130 F. R., 1, relied on by the United States, the object of the conspiracy was to secure for Hughes a salaried position

under the civil service to which he was not legally entitled. The court said (p. 11): "The regulations and requirements (which were subverted) * * * were founded upon law, and were such as the Government had the right to enforce." The decision seems to me in no way inconsistent with the views above expressed. The demurrer to the first count must therefore be sustained.

The second count charges a conspiracy between the same defendants to commit "the offence denounced by section 206 of the Criminal Code." That section provides, inter alia, that whoever being a postmaster shall, for the purpose of fraudulently increasing his compensation, make a false return, statement, or account to any officer of the United States shall be punished.

Objection is made by the defendants to the certainty and formal sufficiency of this count, but in my opinion it properly charges a conspiracy by the defendants, the object of which was that Foster should make false returns to the First Assistant Postmaster General for the purpose of fraudulently increasing Foster's salary as post-
19 master, by knowingly and fraudulently failing to report to him, in the report of gross receipts required to be made monthly to the First Assistant Postmaster General, large and irregular sales of postage stamps to be made by Foster to the defendant Winchell for use in New York City, outside the North Brookfield district.

It is said for the defendants that no such report of gross receipts as is described in the indictment was, in fact, required of Foster; that under the law and the regulations of the department gross receipts were reported quarterly to the auditor, and unusual sales were reported quarterly in a letter to the First Assistant Postmaster General. But such regulations and reports are matters of fact; the allegations in the indictment are explicit, and on demurrer must be taken as true. The question whether the failure to report to the First Assistant Postmaster General unusual sales falsified the report to the auditor also involves questions of fact which cannot be determined on demurrer.

The crime denounced by section 206 of the Criminal Code includes two essential elements, (1) that a return shall be made which was known to be false; and (2) that such false return shall have been made "for the purpose of fraudulently increasing compensation." It is not criminal under said section to make a false return except for the purpose therein stated. From the allegations of the second count of the indictment it clearly appears that the purpose of the alleged false return was to secure for Foster only what he was, in accordance with the views hereinbefore expressed, legally entitled to receive. The making of a false return for such a purpose was not a crime under said section, and the alleged conspiracy to do so was not a conspiracy to commit the offence denounced thereby.

Demurrer sustained as to both counts of the indictment.

20 Petition of the United States of America for a writ of error and assignment of errors. (Filed Nov. 1, 1913.)

Petition for writ of error.

Now comes the United States of America, by its attorney, Asa P. French, and complains that in the record and proceedings, and also in the rendition of a decision and judgment in a plea between the petitioner and one Harold A. Foster, of North Brookfield, in the District of Massachusetts; Frank E. Winchell, of said North Brookfield; William S. Edwards and Harry H. Platt, both of New York, in the State of New York, which was heard upon demurrer to the indictment in the above-entitled cause in the District Court of the United States for said district at the June term, to wit, on the fourteenth day of July, A. D. 1913, and was decided at the September term, A. D. 1913, of said court, to wit, on the second day of October in said year, manifest error hath intervened, to the great damage of the petitioner, in that said court did illegally and upon an improper construction of the statutes upon which said indictment was founded, sustain the demurrers thereto, and did quash said indictment; wherefore the petitioner prays for the allowance of a writ of error, and such other process as may cause the same to be corrected by the Supreme Court of the United States.

Assignment of errors.

And for errors committed by the court in sustaining said demurrers and quashing said indictment, the petitioner alleges as follows:

1. Said court erred in holding that the first count of said indictment did not well allege a conspiracy by the defendants to defraud the United States, in violation of section 37 of the act of March 4, 1909, chapter 321, commonly called the Federal Criminal Code.

2. Said court erred in holding that the object of the conspiracy, as alleged in said first count of the indictment, was a lawful one, to wit, to increase the gross receipts of the post office at North Brookfield, of which the defendant Foster was postmaster, by the purchase of postage stamps in large and unusual quantities, to be used by other defendants upon mail matter to be deposited in the post office at New York, in the State of New York, or at some office other than said North Brookfield post office.

21 3. Said court should have held that the object of the conspiracy alleged in the first count of said indictment was fraudulent, and that said count well alleged a conspiracy to defraud the United States in view of the provisions of section 208 of said Criminal Code, providing that "whoever being a postmaster shall * * * induce, or attempt to induce, for the purpose of increasing the emoluments or compensation of such postmaster, any person to pur-

chase at such post office * * * postage stamps * * * or sell or dispose of postage stamps, stamped envelopes, or postal cards, otherwise than as provided by law, or the regulations of the Post Office Department, shall be punished."

4. Said court erred in its construction of the provisions of section 5 of the act of July 12, 1876, 2 U. S. Compiled Statutes, 2609, and of the act of March 3, 1883, 2 U. S. Compiled Statutes, 2619, entitled "An act to adjust the salaries of postmasters" and of section 161 of the Revised Statutes of the United States, and in holding that the regulations of the Postmaster General defining gross receipts of second-class post offices, are inconsistent with the provisions of said statutes, as appears from the opinion of the court upon demurrer, filed October 2, 1913.

5. Said court erred in holding that the second count of said indictment did not well allege a conspiracy by the defendants in violation of section 37 of said Criminal Code, to commit an offence against the United States, denounced by section 206 of said Criminal Code.

UNITED STATES OF AMERICA,
By ASA P. FRENCH,
United States Attorney.

22 Citation on writ of error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Harold A. Foster, of North Brookfield, in said district; Frank E. Winchell, of said North Brookfield; William S. Edwards, of New York, in the Southern District of New York; and Harry H. Platt, of said New York, greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, in the city of Washington, District of Columbia, on the twenty-ninth day of November, current, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Massachusetts wherein the United States of America is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable James M. Morton, jr., judge of the District Court of the United States for the District of Massachusetts this first day of November, in the year of our Lord one thousand nine hundred and thirteen.

JAMES M. MORTON, JR.,
U. S. District Judge.

23 Officer's return on citation on writ of error.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

BOSTON, *November 5, 1913.*

I hereby certify that on the fifteenth day of November, 1913, I served the within citation on the within-named Harold A. Foster and Frank E. Winchell by giving to each in hand at North Brookfield a true and attested copy of this writ.

Fees: Services, $1.00; travel $4.08—$5.08.

[SEAL.] GUY MURCHIE, *United States Marshal.*
By JAMES W. TIGHE, *Deputy.*

Marshal's No. 9930.

Acknowledgment of service on citation on writ of error.

Nov. 12, 1913.

Service accepted for Platt and Edwards by their attorney.
DANIEL A. ELLIS.

24 Clerk's certificate.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, Charles K. Darling, clerk of the District Court of the United States within and for the District of Massachusetts, certify that the foregoing is a true copy of record in the cause entitled No. 641, criminal docket, United States, by indictment, v. Harold A. Foster, Frank E. Winchell, William S. Edwards, and Harry H. Platt, in said District Court determined, the petition for writ of error and the assignment of errors, and also the original citation on writ of error issued in said cause, with the marshal's return of service thereon, and acknowledgment of service.

In testimony whereof I hereunto set my hand and affix the seal of said District Court at Boston, in said district, this thirteenth day of November, A. D. 1913.

[SEAL.] CHARLES K. DARLING, *Clerk.*

(Indorsement on cover:) File No. 23989. Massachusetts D. C. U. S. Term No. 838. The United States, plaintiff in error, vs. Harold A. Foster, Frank E. Winchell, William E. Edwards, and Harry H. Platt. Filed December 29th, 1913. File No. 23989.

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In the Supreme Court of the United States.

OCTOBER TERM, 1913.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
HAROLD A. FOSTER, FRANK E. WINCHELL, William S. Edwards, and Harry H. Platt. } No. 838.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

MOTION BY THE UNITED STATES TO ADVANCE.

The Solicitor General, on behalf of the United States, respectfully moves this court to advance the above-entitled cause for argument.

The case is before the court on a writ of error under the Criminal Appeals Act.

The indictment contains two counts. The first count charged the defendants with conspiring to defraud the United States by obtaining for one of their number, to wit, the defendant Foster, postmaster at North Brookfield, Mass., compensation in excess of that to which he was entitled by law and by the regulations of the Postmaster General. It is alleged that the defendant Foster, whose salary was based upon the gross receipts of his office, was to

sell to the defendant Winchell large quantities of stamps; these the latter was to forward to defendants Edwards and Platt, of New York City, officers of a certain New York corporation, to be there used by that corporation, and Foster, in making returns of the gross receipts of his office to the Auditor for the Post Office Department, was to include, and did include, receipts from these sales in order that his salary might be increased on the basis of such excessive returns; that all this was in violation of law and of the regulations of the Post Office Department, which forbade the postmaster to include in his return of gross receipts, made for the purpose of readjusting his salary, moneys received from the sale of stamps to be used in mailing matter at other post offices. Certain overt acts in pursuance of this conspiracy were alleged.

The second count charged the defendants with conspiring in substantially the same manner to violate section 206 of the Criminal Code, which penalizes the making of a false return by the postmaster.

Demurrers to the indictment were sustained upon the ground that the facts alleged did not constitute a violation of sections 37 and 206 of the Criminal Code; that the regulations of the Postmaster General with reference to the returns of gross receipts by postmasters were not within the power conferred upon him by the Revised Statutes, section 161; and that the postmaster was justly entitled to compensation on the basis of the gross receipts he so returned.

The decision vitally affects both the regulations and revenues of the Post Office Department in the matter of compensation of postmasters, and is thus of general public interest.

Opposing counsel concur in this motion.

JOHN W. DAVIS,
Solicitor General.

MARCH, 1914.

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